AHMAD SANDARA LELA PUTERA & ANOR. v. QUEENSLAND INSURANCE CO. LTD.

[O.C.J. (Ajaib Singh J.) October 15, 1974]
[Seremban — Civil Suit No. 32 of 1972]

Road Traffic — Third party insurance covering motor cycle only when driven by policy holder — Motor cycle driven by another person — Damages obtained against rider and the policy holder — Whether judgment can be enforced against insurance company — Road Traffic Ordinance, 1958, ss. 79 and 80.

Insurance — Motor insurance — Third party insurance.

In this case the first plaintiff was involved in an accident with a motor cycle as a result of which he suffered injuries. The motor cycle was owned by one Poon Sam and was insured with the defendant company under a policy covering third party risks and stating that the defendant company would be liable only if the motor vehicle was driven by the policy holder. At the time of the accident the motor cycle was being driven by one Poon Kok. The plaintiffs obtained judgment by default against Poon Kok and Poon Sam and sought to recover the damages from the defendant company.

Held: the policy issued in this case covered only the insured and no one else and therefore the defendant company could not be made to indemnify the injured third party.

Cases referred to:-

(1) *Herbert* v. *Railway Passengers Assurance Co.* [1938] 1 All E.R. 650.

(2) *Tan Keng Hong & Anor.* v. *Fatimah binti Abdullah & Ors.* [1974] 1 M.L.J. 156.

The following authorities were also cited in argument: *Yong Moi & Anor.* v. *The Asia Insurance Co. Ltd.* [1964] M.L.J. 307, *Khoo Tiang Seng* v. *People's Insurance Co. Ltd.* [1965] 2 M.L.J. 16, *People's Insurance Co. Ltd.* v. *Khoo Tiang Seng* (F.C.) [1966] 1 M.L.J. 281, *Salbiah & Anor.* v. *Nanyang Insurance Co. Ltd.* [1966] 2 M.L.J. 16, *Nanyang Insurance Co. Ltd.* v. *Salbiah & Anor.* (F.C.) [1967] 1 M.L.J. 94, *Sinnadurai* v. *New Zealand Insurance Co. Ltd.* [1968] 2 M.L.J. 70, *New India Assurance Co. Ltd.* v. *Yeo Beng Chow* (P.C.) [1972] 1 M.L.J. 231, *Public Insurance Co Ltd.* v. *Lee Chau* [1969] 2 M.L.J. 10, *Manap bin Mat* v. *General Accident Fire & Life Assurance Corpn. Ltd.* [1971] 1 M.L.J. 134, *Kayat & Anor.* v. *Lim Yew Seng* [1972] 1 M.L.J. 26, *Digby* v. *General Accident & Life Assurance Corpn.* [1943] A.C. 121, *Fatimah & Ors.* v. *Safety Insurance Co. Sdn. Bhd.* [1973] 1 M.L.J. 75, *Letchumi & Anor.* v. *The Asia Insurance Co. Ltd.* [1972] 2 M.L.J. 105, *Ormrod* v. *Crosville Motor Services Ltd.* [1953] 1 W.L.R. 409, *New India Insurance Co. Ltd.* v. *Simirah* [1966] 2 M.L.J. 1, *Seri & Anor.* v. *Oriental Fire & General Insurance Co. Ltd.* [1969] 1 M.L.J. 126.

CIVIL SUIT.

Atma Singh Gill for the plaintiffs.

S. F. Leow for the defendants.

Ajaib Singh J.: On 18th December, 1967, the first plaintiff was involved in an accident with a motor cycle as a result of which he suffered injuries and was treated in the General Hospital at Malacca where he underwent an operation to remedy a damaged spleen. The motor cycle was owned by one Poon Sam and at the time of the accident it was being driven not by its owner but by one Poon Kok. Subsequently, the plaintiffs brought an action against both Poon Sam and Poon Kok and obtained judgment by default of appearance. Damages were assessed by the High Court at $4,500 to the first plaintiff and $456 as special damages to the second plaintiff with costs taxed at $1,704.07. On the date of the accident Poon Sam was insured with the defendant company in respect of his motor cycle and the plaintiffs have now sued the defendant company under the provisions of section 80 of the Road Traffic Ordinance, 1958, for the sum awarded in the judgment totalling $6,660.07 plus interest and costs.

The policy concerned was in the usual form and it covered third party risks only. Under one of the general exceptions clauses it was specifically stated that the defendant company should not be liable in respect of any accident, loss, damage or liability caused, sustained or incurred whilst the motor vehicle was being driven by or was for the purpose of being driven by him in charge of any person other than as authorised driver. The authorised driver specified in the policy was stated as the policy holder only. Mr. Atma Singh Gill, learned counsel for the plaintiffs, submitted that the person insured was vicariously liable for the negligence of the rider of the motor cycle on the date of the accident and, therefore, the defendant company in turn was liable to indemnify the injured third party under section 80(1) of the Road Traffic Ordinance, 1958. The defendant company, on the other hand, repudiated liability and Mr. S. F. Leow, learned counsel for the company, submitted that the terms of the insurance policy did not cover the rider of the motor cycle at the time of the accident. The policy, he said, covered the insured only as specified in the exception clause and in the provision for authorised driver, and, therefore, the defendant company was not liable under the policy to indemnify the plaintiffs.

Under section 80 of the Road Traffic Ordinance, 1958, an insurer is obliged, subject to the provisions of the section, to satisfy a judgment which a third party may obtain against the person insured in respect of any liability covered by a third party risk policy notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy. Section 80 of the Road Traffic Ordinance, 1958, reads as follows:—

"Duty of insurers to satisfy judgments against persons insured in respect of third party risks.

80. (1) If, after a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled ,the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section —

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either —

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part of this Ordinance in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under the foregoing provisions of this section if, in an action commenced before or within three months after the commencement of the proceedings in which the judgment was given, he has obtained a declaration that apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it: Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

(5) In this section the expression 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and if so at what premium and on what conditions, and the expression 'liability covered by the terms of the policy' means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(6) In this Part of this Ordinance reference to a certificate of insurance in any provisions relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy."

However, the duty of an insurer to satisfy a third party's judgment under section 80 of the Road Traffic Ordinance can arise only if the terms of the policy in the first place provide adequate cover to the person insured under the policy. In the present case before me Poon Sam, the owner of the motor cycle and the person insured, may well be vicariously liable for the negligence of the driver of the motor cycle but I fail to see how the defendant company can be made to indemnify the injured third party under section 80 of the Road Traffic Ordinance when the policy issued by the company covered only the insured and no one else. A case directly on point is that of *Herbert* v. *Railway Passengers Assurance Co.*[1] In that case one Wilkinson was insured with the defendant company against third party risks in respect of his motor cycle with a side-car attached to it. The policy was subject to certain general exceptions one of which was that the defendant company should not be liable in respect of any accident while any motor cycle was being driven by or was for the purpose of being driven by him in charge of any person other than the insured. Wilkinson fell ill while driving the motor cycle with a friend to a football match and he allowed the friend to drive the motor cycle. While being driven by the friend the motor cycle collided with a lorry with the result that the plaintiff was injured and her mother was killed. The plaintiff sued Wilkinson and obtained judgment against him for damages but in her subsequent action against the defendant company to recover those damages under section 10 of the Road Traffic Act, 1934 (which is in *pari materia* with section 80 of the Road Traffic Ordinance, 1958) Porter J. held that upon the construction of the policy the exception clause which limited the respondent company's liability applied and Wilkinson would not have been able to recover under that policy and, therefore, the plaintiff could not recover against the defendant company under section 10 of the Road Traffic Act, 1934.

In the case of *Tan Keng Hong & Anor* v. *Fatimah binti Abdullah & Ors.*[2] a lorry was insured under a third party policy which excepted liability for death caused to any person carried on the vehicle other than a passenger carried by reason of or in pursuance of a contract of employment. The Federal Court held that as the deceased, killed in an accident whilst travelling on the lorry, was not a passenger by reason of or in pursuance of a contract of employment but was getting a free lift on the lorry the insurers were not liable under the policy.

The plaintiffs' claim against the defendant company must fail. A policy of insurance in respect of a motor vehicle is a contractual agreement between the parties concerned and subject to the statutory provisions in Part IV of the Road Traffic Ordinance, 1958, relating to compulsory insurance against third party risks, the parties are absolutely free to decide on the terms and conditions that they wish to incorporate in the policy provided that those terms and conditions are not otherwise illegal or contrary to law. Section 79 of the Road Traffic Ordinance contains a list of restrictions which can have no application on the scope of policies relating to third party risks but a stipulation restricting the driving of a vehicle to the insured himself is not one of the matters listed therein. In the present case the insured and the defendant company were in no way infringing any provision in the Road Traffic Ordinance by agreeing between themselves that the defendant company should not be liable in respect of any accident while the motor cycle was being driven by any person other than the insured himself. At the time of the accident the motor cycle was being driven not by the insured but by some other person and, therefore, as the motor cycle was being used outside the limits of the policy the defendant company was well within its rights in repudiating liability. The defendant company was not under any risk in respect of the motor cycle within the terms and conditions of the policy at the time of the accident so that the judgment which the plaintiffs obtained against the insured was not a judgment in respect of a liability covered by the terms of the policy within the meaning of section 80(1) of the Road Traffic Ordinance, 1958.

The plaintiffs' suit against the defendant company is dismissed with costs.

Order accordingly.

Solicitors: *Syarikat Atma Singh Gill & Gill; Shearn, Delamore & Co.*